

Dear Client,

Welcome to our new format newsletter which we hope to forward to you on a regular basis updating you on recent legal developments and other points of interest. We would be interested in your feedback and please do not hesitate to contact us in respect of any matters that we may be of assistance to you.

## TO CONTRACT OR NOT TO CONTRACT

That is the vexed question.

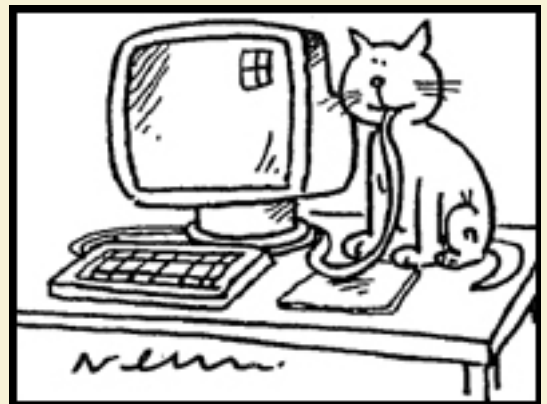
In recent years, industries as diverse as dentistry and the film industry, have established contracts for services from an individual, or company as this has some advantages for both parties.

The contractor providing the services is able, for tax purposes, to obtain deductions on their business expenses. On the other hand, the company hiring the contractor does not have to become involved in holiday pay, other employee benefits and the personal grievances regime under the Employment Relations Act.

The first employment case heard by the Supreme Court (now the final Appellate Court in New Zealand) known as Bryson v. Three Foot Six Ltd. Very briefly, Mr Bryson was a worker in one of the companies working on the Lord of the Rings trilogy. The company Three Foot Six Ltd had a unit established to film special effects. Mr Bryson worked for the unit making models and also setting them up for filming. His brief written agreement described him as an "independent contractor", however many elements of the arrangement were like a typical employment arrangement. Mr Bryson worked fixed regular hours, was paid a regular wage and was subject to the control and direction of Three Foot Six Ltd. He was subsequently made redundant and filed a personal grievance claim, which of course, he could only do if he were an "employee".

The process started in the Employment Relations Authority and the score when it reached the Supreme Court was 2:1 in favour of his being an independent contractor. The Supreme Court found that he was an employee and set out that the main legal principles in determining whether a person qualifies, as a contractor, or an employee are:

- \* The Court must determine the real nature of the relationship.
- \* The intention of the parties is still relevant, but no longer decisive.
- \* Statements made by the parties including contractual statements are not fully determine the nature of the relationship.
- \* The fundamental test examines whether a person performing services is doing so on their own account.
- \* Another matter which may assist in determining status is industry practice and whilst the Court of Appeal regarded this as particularly significant, the Supreme Court disagreed. It is just one of many factors to take into account.



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**WHAT DOES THIS MEAN FOR BUSINESS**

It reaffirms that the Court will look at the real nature of the relationship and take into account all relevant matters, including the terms of the contract and their indications as to the common intention. It is important to get the contract right so that it reflects the intention of the parties. A business should not rely on the fact that both parties have signed the contract describing the relationship as an independent contract, as one of the key themes of the Bryson decision is that the description of the relationship is not the total answer. The practice of the parties throughout the term of the contract is the more important factor. This will always be a question of fact and the following questions will be relevant:

- \* How much do I control the contractor – is it similar to employee control?
- \* Is the contractor in business on his, or her own account? eg. able to make greater profits by rearranging schedules.
- \* Does the contractor only work for me, or does he, or she contract with other organisations?
- \* Does the contractor supply any of their own equipment, or tools?
- \* Would it look to the outside world that the contractor is an integral part of the organisation?
- \* When and where is the work carried out?
- \* Does the type of business justify the hiring of a contractor?

It must also be mentioned that getting it wrong has significant tax implications as if a person was not an independent contractor, you could expect a reassessment of both the employee's and the employer's tax liabilities for payments made under the contract.

**WHERE TO FROM HERE**

Businesses (and contractors) should use this decision as an opportunity to undertake a review of their independent contractor relationships. There are no hard and fast rules, but the form of the contract needs to be looked at and also the facts surrounding each contractor relationship to assess its real nature.

Each case needs to be assessed on its own merits and if you are in any doubt, we are only too happy to provide specific advice. Please contact the partner with whom you normally deal, or Tamara Liebman DDI 300-5558.

**INTERNATIONAL ASSOCIATION**

We continue to be a member of Lawyers Associated Worldwide (LAW) which is an international network of independent commercial law firms located in excess of 70 commercial centres worldwide. This gives us access to advice from a large number of jurisdictions so that we can assist you in your international, or cross-border business endeavours. What is valid in New Zealand is not necessarily valid, or enforceable in other parts of the world.

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